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No. 00-1036

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

PHILIP LOUIS LUCERO, *Petitioner,*

v.

STATE OF CALIFORNIA, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTION PRESENTED

1. Whether a brief testimonial reference that a criminal defendant invoked his right to remain silent during a police interview by requesting counsel pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), violated federal case law when the reference was made by a law enforcement officer called by the defense to testify as a defense witness in the penalty phase retrial of a capital case where guilt was not at issue, where the answer responded to an open-ended defense question, when the defense waited until six witnesses had testified before moving for a mistrial, and when the testimony was ultimately stricken and the jury was expressly admonished to disregard it?

2. Whether a capital defendant can challenge the constitutionality of California's death penalty law during his appeal of a penalty-phase only retrial by arguing that California's statutory special circumstances are not adequate narrowing factors because they render too many murder cases eligible for the death penalty, when the defendant failed to raise any such challenge over ten years ago when the defendant's special circumstance was affirmed during a prior appeal to the California Supreme Court in 1988?

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IN THE SUPREME COURT OF THE UNITED STATES

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PHILIP LOUIS LUCERO, *Petitioner,*

v.

STATE OF CALIFORNIA, *Respondent.*

OPINION OR JUDGMENT BELOW

The California Supreme Court opinion in People v. Lucero, 23 Cal. 4th 692, 3 P.3d 248, 97 Cal. Rptr. 2d 871 (2000), as modified August 30, 2000. (Petr.'s App. A and B.)

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioner relies on the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. These provisions are set forth in the Petition for Writ of Certiorari at page 2. Sections 189, 190, 190.1, 190.2, 190.3, and 190.4 of the 1980 California Penal Code, are reproduced in Respondent's Appendix A.

STATEMENT OF THE CASE

In 1981, Petitioner Philip Louis Lucero was sentenced to death after a California jury found him guilty of two counts

of murder and one count of arson, and found true an alleged multiple-murder special circumstance pursuant to California Penal Code section 190.2(a)(3). In 1988, the California Supreme Court affirmed this judgment of guilt on direct appeal, including the multiple murder special circumstance finding, but reversed the judgment of death, holding that the trial court had improperly excluded certain mitigating evidence at the penalty phase of the 1981 trial. The case was remanded for a penalty phase retrial. People v. Lucero, 44 Cal. 3d 1006, 750 P.2d 1342, 245 Cal. Rptr. 185 (1988). After the penalty phase retrial in 1989, the jury imposed the death penalty. The trial court again sentenced Petitioner to death. Petitioner appealed the penalty retrial judgment. The California Supreme Court entered judgment affirming the death sentence on July 13, 2000, and denied a petition for rehearing on August 30, 2000. People v. Lucero, 23 Cal. 4th 692, 3 P.3d 248, 97 Cal. Rptr. 2d 871. (Petr.'s App. A and C.)

STATEMENT OF FACTS

Petitioner murdered two little girls and committed arson on April 12, 1980. After luring ten year old Teddy Engilman and seven year old Chrissy Hubbard into his home, he beat Teddy so forcefully with a heavy glass soda bottle that he fractured her skull into separate pieces and she died by inhaling her own blood while unconscious. Petitioner strangled Chrissy to death. Petitioner hid the bodies in a trash dumpster and tried to burn down his house which contained evidence of the murders, leaving his own dog behind to die in the fire. Police and firefighters responded and the dog was rescued. The bodies were found that night and Petitioner was soon arrested. Lucero, 23 Cal. 4th at 708-10. (Petr.'s App. A, at 2-3.)

Testimonial Reference To Petitioner's Miranda v. Arizona, 384 U.S. 436 (1966) Invocation

Petitioner called Deputy Sheriff Ronald Dvorak as a defense witness during the defense case of the penalty phase retrial. Petitioner's counsel asked Deputy Dvorak on direct examination to characterize Petitioner's demeanor during an April 12, 1980, police interview. When Deputy Dvorak tried to clarify whether the answer was wanted in "one word," defense counsel responded, "Or more, if you want." Deputy Dvorak then testified Petitioner was cordial while he was led to believe the officers were investigating the arson, but as time went on, it became more of a cat and mouse game to the point where Petitioner shut down the interview by saying, "I want to talk to my attorney." Petitioner's counsel did not object to the response. Upon further inquiry by defense counsel, Deputy Dvorak elaborated that Petitioner was subdued, perhaps too clam. By this, he meant Petitioner was playing cat and mouse, pretending that he did not understand some questions. Petitioner was self-serving and calm. (12 RT 3025-27.)[1]

Later, the prosecutor cross-examined Deputy Dvorak about the quality and tone of Petitioner's voice, but the defense objected that this exceeded the scope of direct examination. In chambers, the prosecutor asked to introduce Petitioner's police interview tape. The defense objected, saying that although they asked about Petitioner's demeanor, they did not ask about his tone of voice or statements. The prosecutor noted that demeanor includes tone and quality of voice, said the defense had made it an issue, and argued the tape was admissible. In the

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1. "RT" refers to the reporters transcript of Petitioner's 1989 penalty retrial, designated here numerically by volume. Likewise, "1 CT" refers to volume one of the clerk's transcript of that 1989 retrial. "CT" refers to the clerk's transcript of Petitioner's 1981 trial.

context of arguing against admission of the tape, Petitioner's counsel noted in passing that any testimony concerning Petitioner invoking Miranda v. Arizona, 384 U.S. 436 (1966), rights should be stricken. (12 RT 3029-32.)

The trial court confirmed that the direct examination elicited an opinion about Petitioner's attitude as expressed by demeanor. The prosecutor argued the tape was admissible since the defense had elicited part of a statement. The defense argued Deputy Dvorak's response was voluntary. The trial court agreed, noting that the defense had gone into the conversation and whatever was brought out was a voluntary statement, not the result of a question. The trial court did not allow the prosecutor to introduce the interview tape during cross-examination, but said that it might be rebuttal evidence. (12 RT 3031-35, 3036.)

Thereafter, six more defense witnesses testified. (12 RT 3038-146.) At the beginning of the following day, defense counsel mentioned what he described as the partly non-responsive answer by Deputy Dvorak (particularly the part about Petitioner invoking his rights), said the answer was highly inadmissible for any purpose, and asked the trial court to declare a mistrial or to strike the response. (13 RT 3147-48.) The prosecutor opposed the motion, noting the answer was elicited in response to a very vague and open-ended defense question. The prosecutor argued that it would be a miscarriage of justice to grant a mistrial at that point based on evidence the defense had presented. The trial court agreed, stating that there was no basis for a mistrial and noting that the time to object had since passed. But the trial court did grant Petitioner's request to strike all of Deputy Dvorak's response after "cat and mouse game," and struck any testimony about Petitioner's desire to speak with counsel. (13 RT 3148-50.)

During rebuttal, the prosecution introduced the police interview tape. (15 RT 3863, 3866-67.) Beforehand, Petitioner wanted to make sure that any reference to his request for counsel was redacted from the tape and its transcript. Defense

counsel said he hoped that the prosecutor had instructed Deputy Dvorak to refrain from mentioning the Miranda invocation. Noting the earlier situation, defense counsel emphasized that he was sure that the earlier mention of Petitioner's request for counsel was an oversight by the witness. Confirming that the tape and transcript were edited, the prosecutor said he wanted to re-emphasize to Deputy Dvorak to refrain from referring to the invocation regardless of the nature of the question. (16 RT 3876-77.)

Petitioner's Direct Appeal On The Miranda Issue

On appeal of the penalty retrial before the California Supreme Court, Petitioner contended the trial court should have granted his motion for mistrial because the testimonial reference to Petitioner invoking his Miranda rights was prejudicial and constituted prosecutorial misconduct because the prosecution is precluded from introducing such evidence. Petitioner cited Doyle v. Ohio, 426 U.S. 610 (1976), and Wainwright v. Greenfield, 474 U.S. 284 (1986), which collectively hold that the prosecution cannot penalize a defendant for invoking his Miranda rights to silence or counsel by using those invocations against the defendant at trial through evidence or argument.

Petitioner asserted that the prosecutor and Deputy Dvorak committed deliberate prosecutorial misconduct because the prosecution was on notice the defense was opposed to evidence of the Miranda invocation, and the witness should have known this. Petitioner claimed that since Deputy Dvorak was a law enforcement officer, the prosecutor was responsible for his testimony even though the testimony came when called as a defense witness, citing state case law requiring prosecutors to guard against inadmissible testimony from prosecution witnesses and to warn prosecution witnesses to refrain from giving such testimony. People v. Warren, 45 Cal. 3d 471, 481-82, 754 P.2d 218, 247 Cal. Rptr. 172 (1988). Petitioner argued

that the testimony was prejudicial error and could not be characterized as harmless beyond a reasonable doubt, and he claimed that it likely caused an unreliable penalty determination at his penalty retrial.

Petitioner's Constitutional Challenge To California's Death Penalty Law

On appeal, Petitioner also claimed that California's death penalty statutory scheme as a whole was facially unconstitutional because California's felony murder law makes virtually all murder cases first degree murder cases and because too many first degree murder cases are eligible for the death penalty due to the sheer number of statutory special circumstances. Petitioner argued that these laws do not adequately narrow the class of eligible death penalty defendants as required by the Eighth and Fourteenth Amendments.

The California Supreme Court Decision

The California Supreme Court disagreed with these claims. First addressing Petitioner's claim regarding his motion for mistrial, the court did not decide whether the issue was waived, assuming for the sake of argument that it had been preserved. The court found no error. The court discussed California case law which requires a trial court to grant a motion for mistrial when informed of prejudice that it judges to be incurable by admonition or instruction. Because the question of whether a particular incident is incurably prejudicial is inherently speculative, California trial courts are vested with considerable discretion in ruling on mistrial motions. The court held that ordinarily evidence a defendant has invoked the right to remain silent creates a danger that the jury will draw an impermissible inference of guilt from the testimony. The court

concluded that since Petitioner's guilt was not at issue at the penalty phase retrial, this danger did not exist in this case. The court also rejected the claim that the jury could have relied on the evidence to infer that Petitioner was acting in a cold blooded fashion after the murders and therefore conclude he should be sentenced to death, pointing out that neither the prosecutor nor the witness suggested that the jury should draw this inference. The court concluded the trial court did not abuse its discretion when it denied the motion for mistrial by concluding that Deputy Dvorak's testimony could be cured by an admonition to the jury to disregard it. Lucero, 23 Cal. 4th at 713-14. (Petr.'s App. A, at 8-9.)

The California Supreme Court separately addressed Petitioner's prosecutorial misconduct claims, including the claim that the testimonial reference to Petitioner's invocation of his rights was prejudicial misconduct. The court held that the record disclosed no evidence the prosecutor was in any way responsible for Deputy Dvorak's comment. The court rejected the state law claim that the prosecutor was responsible to warn Deputy Dvorak and guard against inadmissible evidence simply because Dvorak had been a prosecution witness and was a law enforcement officer, finding that this obligation arises when witnesses are called by the prosecution. Here, the witness was called by the defense, not the prosecution. The court also rejected the claim that Deputy Dvorak committed misconduct, finding that any possibility of prejudice was cured when the trial court struck the testimony and admonished the jury to disregard it. Id., at 718. (Petr.'s App. A, at 15-16.)

Concerning Petitioner's challenge to the constitutionality of California's death penalty statute, the California Supreme Court did not decide whether the claim could be properly raised since the special circumstance was not at issue at the penalty retrial. Assuming for the sake of argument that Petitioner could raise the contention, the court rejected the claim after noting that it had repeatedly rejected the same one before, citing People v. Frye, 18 Cal. 4th 894, 1029,

959 P.2d 183, 77 Cal. Rptr. 2d 25 (1998), cert. denied, Frye v. California, 526 U.S. 1023 (1999), People v. Bacigalupo, 6 Cal. 4th 457, 467, 862 P.2d 808, 24 Cal. Rptr. 2d 808 (1993), cert. denied, Bacigalupo v. California, 512 U.S. 1253 (1994), and People v. Wader, 5 Cal. 4th 610, 669, 854 P.2d 80, 20 Cal. Rptr. 2d 788 (1993), cert. denied, Wader v. California, 512 U.S. 1253 (1994). The court was not persuaded to reconsider its prior holdings. Lucero, 23 Cal. 4th at 740. (Petr.'s App. A, at 46.)

ARGUMENT

I.

CERTIORARI SHOULD BE DENIED ON PETITIONER'S CLAIM CONCERNING THE TESTIMONY ABOUT HIS REQUEST FOR COUNSEL BECAUSE THE ISSUE WAS WAIVED BELOW, THE STATE COURT DECISION DOES NOT CONFLICT WITH FEDERAL LAW, THE FACTS OF THE PRESENT CASE ARE UNIQUE, AND BECAUSE THE STATE COURT CORRECTLY DECIDED THE ISSUE IN THE PRESENT CASE

Petitioner contends this Court should grant review because the prosecution violated his right to invoke Miranda v. Arizona, 384 U.S. 436 (1966), rights during a police interrogation without any adverse consequences at trial, and contends a decision will help lower courts resolve the issue of whether such a reference is prejudicial. Petitioner contends the California Supreme Court wrongly concluded that the reference to his Miranda invocation did not violate due process because the evidence was elicited at a penalty phase and guilt was not at issue, in light of the rationale of Wainwright v. Greenfield, 474 U.S. 284, 292 (1986), which found a due process violation in a sanity proceeding where the prosecution presented argument about a defendant's invocation of Miranda rights to prove sanity. Petitioner also disputes the California Supreme Court's finding of no prejudice, claiming that the court's reasoning that neither the prosecution nor the witness asked the jury to draw an inference in favor of death from the invocation is unpersuasive. (Pet. 6-9.) Respondent disagrees. Certiorari should be denied

because the present issue was waived, the California Supreme Court correctly decided the issue and its decision does not create a conflict of law, because the facts of the present care are unique and the evidence was stricken.

Preliminarily, Petitioner incorrectly claims that he raised a timely objection. There was no objection when Deputy Dvorak gave the response during the defense direct examination or before the prosecution began cross examination. And, although Petitioner did later request that any reference to Petitioner invoking his rights should be stricken, this occurred during a chambers conference on another issue during cross examination. No ruling was sought and no further mention was made until the next day when the defense moved for a mistrial. By then, six other defense witnesses had testified. Although the California Supreme Court did not decide the question of waiver, the issue was clearly waived and certiorari is therefore inappropriate.

In addition, contrary to Petitioner's claim, the California Supreme Court did not conclude that a due process violation did not exist simply because the case involved a penalty phase retrial where guilt was not at issue. (Pet. 7.) The California Supreme Court relied on that factual distinction while discussing whether there was prejudice requiring the trial court to grant a motion for mistrial. In this context, the court distinguished the ordinary situation where there is a recognized danger that a jury will draw an inference of guilt from evidence of an invocation of Miranda rights. The court held there was no such danger of prejudice here because guilt was not at issue. Next, the court rejected the claim that the jury could have relied on the testimony to conclude that Petitioner was cold blooded after the murders and therefore should receive the death penalty, finding that neither the prosecutor nor the witness suggested the jury should draw this inference. The court concluded that the trial court had not abused its discretion when it denied Petitioner's motion for mistrial by concluding that Deputy Dvorak's testimony could be cured by an admonition to the jury

to disregard it. (See Petr's App. A, 8-9.) Thus, Petitioner erroneously characterizes the decision by reading its language out of context.

Additionally, certiorari should be denied because the lower court's decision was correct and does not conflict with this Court's precedents. Miranda stated that the prosecution cannot use at trial the fact that a defendant stood mute or invoked his Miranda privilege in the face of an accusation. Miranda, 384 U.S. at 468, n.37, citing Griffin v. California, 380 U.S. 609 (1965). Doyle v. Ohio, 426 U.S. 610 (1976), held that the prosecution cannot use evidence of a Miranda invocation for impeachment at trial. Wainwright held that the prosecution could not argue that a defendant's request for counsel under Miranda was evidence of his sanity. Wainwright, 474 U.S. at 292. Collectively, these cases preclude state and federal prosecutors from introducing and using such evidence against criminal defendants.

Here, the California Supreme Court correctly concluded that the prosecutor never introduced such evidence against Petitioner as there was no evidence that the prosecutor was in any way responsible for Deputy Dvorak's testimony when he testified as a defense witness during the defense case. Also, as the court correctly explained, the prosecution's duty to guard against inadmissible statements from his witnesses and to warn his witnesses does not extend to situations where the witness is called by the defense. In the context of finding no prejudice, the court pointed out that neither the prosecutor nor the witness suggested the jury should use the testimony to draw an inference that Petitioner was cold blooded and should receive the death penalty. (Petr's App. A, 15-16.) Thus, the rationale of Doyle, Wainwright, or similar cases is inapplicable to the facts of the present case. These precedents are not contrary to the state court decision because the prosecutor here never introduced or used the evidence against Petitioner.

Because the brief testimonial reference to Petitioner's invocation of Miranda rights was not prejudicial and was not

used against him, the testimony did not violate any precedents barring comment on a defendant's invocation of Miranda rights or the introduction of such evidence. The conclusion is consistent with those federal circuits that have considered similar claims where a prosecution law enforcement witness briefly testifies about a defendant's invocation but that testimony is not otherwise used against the defendant in any way. See Noland v. French, 134 F.3d 208, 216-17 (4th Cir. 1998), cert. denied, Noland v. French, 525 U.S. 851 (1998); Lindgren v. Lane, 925 F.2d 198, 201-03 (7th Cir. 1991), cert. denied, Lindgren v. McGinnis, 502 U.S. 831 (1991); United States v. Mills, 597 F.2d 693, 696 (9th Cir. 1979); United States v. Haro-Portillo, 531 F.2d 962, 963-64 (9th Cir. 1976). Nor is there any conflict among the states. The only other state supreme court to consider a similar issue also found no violation of the rule precluding the prosecution from arguing or introducing such evidence where the invocation was briefly mentioned in prosecution testimony by a law enforcement officer and not otherwise used by the prosecution. State v. Lee, 114 Ariz. 101, 103-04, 559 P.2d 657 (1976).

Aside from the fact that the prosecution did not introduce or use the testimony, the court correctly decided that the prosecutor was not responsible for Deputy Dvorak's response and was not required to warn him or guard against inadmissible evidence because the case involved the defense questioning a defense witness. And, the trial court struck the offending testimony on request and admonished the jury to disregard it. These facts provide further reason for denying certiorari because the case would be limited to its unique facts.

Petitioner has failed to present an issue worthy of review under Rule 10 of the Rules of the Supreme Court of the United States. The state court has not decided an important federal question in a way that conflicts with other state courts of last resort, or with federal circuit courts. Nor did the state court decide an important issue of federal law that has not been, but should be, settled by this Court. Finally, the state court decision

does not conflict with relevant decisions of this Court. No rule of law requires this Court to hear this case.

II.

CERTIORARI SHOULD BE DENIED ON PETITIONER'S CLAIM THAT CALIFORNIA'S DEATH PENALTY LAW IS UNCONSTITUTIONAL BECAUSE IT INADEQUATELY NARROWS THE NUMBER OF MURDER CASES ELIGIBLE FOR THE DEATH PENALTY BECAUSE THIS ISSUE WAS WAIVED BY FAILING TO RAISE IT DURING A PRIOR APPEAL, BECAUSE THIS COURT HAS EXPRESSLY OR IMPLIEDLY REJECTED THE ISSUE, AND BECAUSE THE STATE COURT CORRECTLY DECIDED THE ISSUE

Petitioner contends California's death penalty statute as a whole is facially unconstitutional because fails to provide a meaningful narrowing of the class of murderers eligible for death. Petitioner contends that almost all first degree murderers, and the vast majority of all murderers, are death eligible in California because of the number of special circumstances set forth in California Penal Code section 190.2, which provides nineteen circumstances of first degree murder cases that are death eligible, and because California's felony murder rule allows for virtually every murder case to be a first degree murder case. (Pet. 8-13.) Respondent disagrees. Certiorari should be denied because Petitioner failed to preserve the claim and failed to present facts showing there was insufficient narrowing in this case, because this Court has expressly or impliedly rejected the issue, and because the state court correctly rejected the claim.

First, Petitioner distorts the record by claiming that he properly preserved this issue with a timely objection. Petitioner

waived the issue by not challenging the statute on this basis at his 1981 trial or at all during his first appeal which was decided in 1988. Before the 1981 trial, Petitioner had moved to dismiss the multiple murder special circumstance allegation, claiming, among other things, that it was unconstitutionally vague and ambiguous. (CT 112-19.) But Petitioner did not raise his vagueness argument or the instant challenge to the entire statute in his first appeal. People v. Lucero, 44 Cal. 3d 1006, 750 P.2d 1342, 245 Cal. Rptr. 185 (1988). In that prior 1988 appeal, the California Supreme Court affirmed the special circumstance but reversed the death judgment for evidentiary reasons and remanded the case for a retrial on the penalty phase. Id., at 1032.

Before the penalty phase retrial in 1989, Petitioner again unsuccessfully moved to dismiss the special circumstance allegation or to bar imposition of the death penalty, citing statutory grounds, and various cases and constitutional provisions, while arguing that death would be an unconstitutionally cruel and unusual punishment, and disproportionate, on the facts of his particular case. (1CT 132-54, 279.) The trial court denied the motion because there was "no legitimate basis" for it to dismiss the special circumstance. (1 RT 85.) But the 1989 retrial only involved the penalty, not the special circumstance providing Petitioner's eligibility for the death penalty as decided by the first jury in 1981. That guilt phase issue was not the subject of the penalty retrial, irrespective of Petitioner's belated motion to dismiss the special circumstance before the retrial and irrespective of the California Supreme Court's failure to decide this point in its recent decision. Petitioner could not properly raise such issues at the penalty phase retrial in 1989. People v. Hayes, 11 Cal. 4th 1171, 1225, 906 P.2d 1068, 47 Cal. Rptr. 2d 800 (1995).

Even if Petitioner could have properly challenged the statute at the 1989 penalty retrial, he never argued that the law failed to adequately narrow the class of eligible murderers, instead claiming the penalty was unconstitutionally cruel and

unusual on the facts of his case, and disproportionate compared with others. (1CT 132-54, 279.) It is simply too late in the day for Petitioner to successfully attack the constitutionality of California's 1978 death penalty law.

In any event, certiorari should also be denied because this Court has already expressly or impliedly considered the constitutionality of California's death penalty law. There is no reason for this Court to suddenly change course to consider this particular question.

The constitutionality of California's 1977 death penalty law, superseded by a 1978 initiative, was essentially upheld in Pulley v. Harris, 465 U.S. 37, 31-33 (1984), where the absence of proportionality review was challenged. This Court noted that the requirement for a California jury to find at least one special circumstance limited the death sentence to a small subclass of eligible cases and the list of statutory penalty factors suitably directed and limited the jury's discretion. Further noting the trial judge's review of the decision and state supreme court review, this Court described California's system as being "a far cry from the major systemic defects identified in [Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)]." Harris, at 53-54. This Court noted that the 1978 law replaced the 1977 law with the "substantially similar provisions now in effect." Harris, at 40, n.1. In Harris, this Court noted that the current statute had greatly expanded the statutory special circumstances from the seven circumstances listed in the 1977 law. Id., at 53, n.13.

And, in a long line of prior cases, the California Supreme Court has repeatedly rejected claims identical to the one raised by Petitioner here, finding that California's 1978 death penalty law is essentially identical to the prior 1977 law by requiring the jury to find at least one special circumstance beyond a reasonable doubt, thereby limiting the death sentence

to a small sub[illegible]bclass of murders.[2] These conclusions are correct. See People v. [illegible]v. Frye, 18 Cal. 4th 894, 1029, 959 P.2d 183, 77 Cal. Rptr. 2d [illegible]125 (1998).

Pe[illegible]titioner maintains that California's special circumstance[illegible]es are too many and overly inclusive. But the California [illegible]Supreme Court has held that these special circumstance[illegible]es are not over-inclusive by their number or terms. People v. Ra[illegible]y, 13 Cal. 4th 313, 356-57, 914 P.2d 846, 52 Cal. Rptr. 2d 29[illegible]5 (1996), cert. denied, Ray v. California, 519 U.S. 967 (1996); People v. Crittenden, 9 Cal. 4th 83, 154-56, 885 P.2d 887, 36[illegible]5 Cal. Rptr. 2d 474 (1994), cert. denied, Crittenden v. California[illegible], 516 U.S. 849 (1995). Also, Petitioner's claim that the felony [illegible]murder rule makes too many murders into first [illegible]rder cases was implicitly rejected in People v. Anderson, [illegible]43 Cal. 3d 1104, 1147, 742 P.2d 1306, 240 Cal. Rptr. 585 (1987), and People v. Marshall, 50 Cal. 3d 907, 946, 790 P.2d 676, 269 Cal. Rptr. 269 (1990), cert. denied, Marshall v.

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2. E.g., People v. Bacigalupo, 6 Cal. 4th 457, 467, 862 P.2d 808, 24 Cal. Rptr. 2d 808 (1993), cert. denied, Bacigalupo v. California, 512 U.S. 1253 (1994); People v. Earp, 20 Cal. 4th 826, 904-05, 978 P.2d 15, 85 Cal. Rptr. 2d 857 (1999), cert. denied, Earp v. California, 120 S. Ct. 1272, 146 L. Ed. 2d 221 (2000); People v. Welch, 20 Cal. 4th 701, 766-67, 976 P.2d 754, 85 Cal. Rptr. 2d 203 (1999), cert. denied, Welch v. California, 120 S. Ct. 1160, 145 L. Ed. 2d 1071 (2000); People v. Majors, 18 Cal. 4th 385, 432, 956 P.2d 1137, 75 Cal. Rptr. 2d [illegible], cert. denied, Majors v. California, 526 U.S. 1007 (1999); People v. Holt, 15 Cal. 4th 619, 697, 937 P.2d 213, 63 Cal. Rptr. 2d 782 (1997), cert. denied, Holt v. California, 522 U.S. 1017 (1997); People v. Arias, 13 Cal. 4th 92, 186-87, 913 P.2d 980, 51 Cal. Rptr. 2d 770 (1996), cert. denied, Arias v. California, 520 U.S. 1251 (1997); People v. Sanchez, 12 Cal. 4th 1, 60-61, 906 P.2d 1129, 47 Cal. Rptr. 2d 843 (1995), cert. denied, Sanchez v. California, 519 U.S. 835 (1996).

California, 498 U.S. 1110 (1991), which held that the felony murder special circumstance itself was an adequate narrowing factor. Frye, 18 Cal.4th at 1030.

Furthermore, this Court has impliedly rejected Petitioner's claim by repeatedly upholding various parts of the 1978 law as constitutional. California v. Ramos, 463 U.S. 992, 1004, n.19 (1983) [California's death penalty law complies with the mandate to permit a defendant to present any evidence to show that a penalty less than death is appropriate]; California v. Brown, 479 U.S. 538, 543 (1987) [in context of a penalty factors instruction, the Court noted its "approval of this statutory scheme."]; see Boyde v. California, 494 U.S. 370 (1990). In Tuilaepa v. California, 512 U.S. 967, 975-80 (1994), this Court held that three of California's penalty factors were constitutional while expressly proceeding on the assumption that California's statutory eligibility factors were adequate.

The California Supreme Court correctly concluded that California's 1978 death penalty law is constitutional. A death penalty law is constitutional if it suitably narrows the class of death-eligible defendants, and then provides for an individualized penalty determination. McCleskey v. Kemp, 481 U.S. 279, 305-06 (1987). The narrowing may occur at the guilt or sentence selection stage. Lowenfield v. Phelps, 484 U.S. 231 (1988). A narrowing factor must meet two requirements. First, it may not apply to every defendant convicted of murder and must only apply to a subclass of defendants convicted of murder. Second, it may not be unconstitutionally vague. Tuilaepa, 512 U.S. at 971-72.

California limits the scope of its capital homicide laws by dividing murder into degrees and making death sentences discretionary even in first-degree murder cases. Cal. Penal Code §§ 189, 190. California narrows the class of murderers eligible for the death penalty by providing that only first degree murderers are eligible and by requiring special circumstances to be found true before such a defendant may be eligible for a death sentence. Cal. Penal. Code §§ 190.2, 190.4. At the guilt

phase of a capital trial in California, the trier of fact determines whether the special circumstances alleged by the prosecution are true. Cal. Penal Code § 190.1(a). At the penalty phase, the trier of fact weighs any aggravating circumstances, including any special circumstances found to be true, against any mitigating circumstances in deciding whether the defendant should receive death or life in prison without possibility of parole. Cal. Penal Code § 190.3. Accordingly, California's narrowing factors ensure that imposition of the death penalty is not arbitrary and "freakish." Cf. Wainwright v. Goode, 464 U.S. 78, 87 (1983) (per curiam; Florida law).

Finally, certiorari should be denied because Petitioner cannot show that his rights were violated in this case because the multiple murder special circumstance found to be true in the present case was one of the special circumstances contained in the 1977 California death penalty statute held to be constitutional in Harris. Harris, 456 U.S. at 53-54. Accordingly, the instant case is not worthy of review. Therefore, certiorari should be denied.

CONCLUSION

Accordingly, Respondent respectfully asks that the Petition for Writ of Certiorari be denied.

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Respectfully submitted,

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